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Important Late Decisions

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IMPORTANT LATE DECISIONS

CARRIERS—NEGLIGENCE—PASSENGER'S FAILURE TO WARN OF DANGER AS CONTRIBUTORY NEGLIGENCE.—The plaintiff was awarded damages against a taxi-cab company for injuries sustained when the driver of the cab in which she was a passenger proceeded in the wrong direction along a one-way street and collided with an automobile traveling in the opposite direction. Defendant company answered with a general denial and an allegation of contributory negligence on the part of the plaintiff. To establish the latter, defendant brought out the fact that the plaintiff did not protest or endeavor to prevent the driver from violating the traffic rule by driving in a prohibited direction. *Held*, that while the plaintiff as a passenger may have participated in the illegal use of the street in question, thus becoming trespasser as against the driver of the other vehicle involved, yet, since such participation was not due to her act, or omission, nor assented to by her, the defense of contributory negligence was not affirmatively established; that she and the defendant, acting by its employee, were not, as to each other, *in pari delicto*. *Rea v. Checker Taxi Co.*, 172 N. E. 612 (Mass. 1930).

The conclusion reached by the Supreme Judicial Court of Massachusetts was, under the facts, a proper one, but some portions of its decision are so unhappily expressed as to be misleading and leave one in doubt as to the correctness of at least one of its legal assumptions. For instance, the court says that the plaintiff and defendant, as to each other, are not *in pari delicto*, but indicates that under the facts the plaintiff would be guilty of contributory negligence, had the action been by plaintiff against the operator of the other vehicle. In this connection a prior case decided by this court is cited.¹ There the plaintiff, who was a passenger in an automobile driven in the wrong direction down a one-way street, sought to recover damages for injuries resulting from a collision with another automobile, from the driver of the latter vehicle. The court held that even though the plaintiff was merely a passenger in the car that was driven contrary to the ordinance or traffic rule, he could not recover, for the highway was used illegally and he was participating in this use, and the illegal use of said highway was not a mere condition of an accident, but a contributory cause of such accident. Nowhere in this case, however, does the court give its holding a secure legal foundation by showing any lack of care on the part of the plaintiff, who

¹ *Widronak v. Lord*, 168 N. E. 799 (Mass. 1929).

was not shown to have exercised control or to have failed to show ordinary and reasonable diligence for his own safety and that of others. The doctrine of *pari delicto* indulged in by the court does not impress us as a sound legal assumption. For, to bar a recovery by plaintiff, such a defendant would be put to the same proof as defendant herein was, namely, showing that plaintiff was in control of the taxi-cab or that she omitted to warn the driver of the approaching danger after she knew or reasonably should have known it existed, and that such omission was the proximate cause of the collision. The standard for gauging negligence would be the usual test of the care which one of ordinary prudence would exercise under similar circumstances. However, as regards the principal holding of the court relative to negligence of passengers in common carriers in failing to notify the driver of impending danger, it is orthodox and consistent with the common law rules of contributory and imputed negligence.² It is the duty of the carrier to use all necessary precautions to carry the passenger safely to his destination and no duty rests upon the passenger to warn the driver of impending dangers. This is solely the driver's duty.³ If a person rightfully entrusts his person to the care of the owner of an automobile without any voice as to how the vehicle shall be operated, the owner owes to him the duty of exercising ordinary care for his safety in the driving of the vehicle.⁴

CRIMINAL LAW—SEPARATION OF JURY—PROPRIETY OF PERMITTING WOMEN JURORS TO SEPARATE DURING DELIBERATION FOR PURPOSE OF SLEEPING.—In a trial of the defendant under indictment for violation of the Eighteenth Amendment to the Constitution of the United States, a mixed jury, deliberating on a verdict, were unable to come to an agreement by 11:45 o'clock at night. The court therefore directed that the women jurors be taken to a hotel in custody of a woman bailiff. They were kept in a room in the designated hotel by themselves and the men were kept by themselves. The defendant contended that the separation of jurors amounted to an acquittal. *Held*, where mixed jury fails to arrive at verdict court may, where no accommodations are provided by county, direct women members to separate from the men to be taken for the night to a hotel

² O'Tier v. Sell, 252 N. Y. 400; Baker v. Elebash, 220 Ala. 198; Graber v. Cormack et al., 148 Atl. 156 (N. J. Misc. R. 1929); Heims v. Bluhm, 200 Wis. 321; Freeman v. West Jersey & Seashore R. R. Co., Inc., 149 Atl. 40 (N. J. Misc. R. 1930); Billingsley v. McCormick Transfer Co., 58 N. D. 921; Bullard v. Boston Elevated Railway Co., 226 Mass. 262.

³ Reitz v. Yellow Cab Co., 248 Ill. App. 287.

⁴ Warput v. Reading Coal Co., 250 Ill. App. 450.

in custody of woman bailiff. *State v. Murphy*, 232 N. W. 335 (Minn. 1930).

Every man is entitled to a fair and impartial trial by a jury of his peers. That this guarantee, included in most state constitutions, be enforced to the letter the jury must continue impartial and unbiased until after the verdict is rendered, and one of the means of maintaining this impartiality is by refusing to allow the jury to separate from each other, or mingle with the balance of the community after it has been sworn.⁵ The ancient rule was that once the jury was sworn, whether in a civil or criminal case, it could not be permitted to separate until they had agreed upon their verdict.⁶ The rule has been relaxed, however, so that today, a separation before the cause is submitted to the jury for verdict is permitted in both civil⁷ and misdemeanor cases.⁸ But the courts are still somewhat divided as to the rule of permitting separation during trial in cases of felonies less than capital. In many states in such cases it is held that the jury may, in the discretion of the judge, be permitted to separate.⁹ In some states separation is provided for by statute.¹⁰ In other states the rule is more stringent and separation will not be permitted.¹¹ In most states holding this way, however, it is held that the verdict will not be disturbed where it is affirmatively shown that the prisoner has not been prejudiced by the separation.¹² But even where the more liberal rule exists it is sometimes held that if there are reasonable grounds to believe that the separation of the jury has given rise to any improper practice or prejudicial misconduct the verdict will be set aside.¹³ In capital cases it is generally held that a separation before the cause has been submitted to the jury will be ground for new trial.¹⁴ As a rule, however, no improper separation occurs where the jury separate during adjournments of court if they are accompanied by sworn officers, and unless some improper communication is had with the juror, the verdict will not in such a case be disturbed.¹⁵ But if the jurors in a capital case leave the custody of the sworn officer during an adjournment it will be error for which

⁵ *McLain v. State*, 18 Tenn. 240.

⁶ *State v. Miller*, 1 Dev. & B. 508.

⁷ *Stancell ex'r. v. Kenan et al.*, 33 Ga. 56.

⁸ *Rex v. Kinnear*, 2 Barn. & Ald. 462.

⁹ *Davis v. State*, 15 Ohio 72; *Commonwealth v. Costello*, 128 Mass. 88; *Sutton v. People*, 145 Ill. 279.

¹⁰ *State v. Gillick*, 10 Ia. 98; *Caw v. People*, 3 Neb. 357.

¹¹ *State v. Sherbourne*, Dudley (Ga.) 28.

¹² *Wood v. State*, 34 Ark. 341.

¹³ *State v. Madoil*, 12 Fla. 151.

¹⁴ *People v. Shafer*, 1 Utah 260; *State v. Desmond and E. & O. Connor*, 5 La. Ann. 398.

¹⁵ *State v. Cucuel*, 31 N. J. L. 249; *Crockett v. State*, 52 Wis. 211.

a new trial will be granted if there be the slightest suspicion of abuse,¹⁶ although the mere separation alone will not be ground for new trial.¹⁷ But in some states misconduct and abuse will always be presumed in a capital case upon a separation of the jury, and it must be shown affirmatively by the prosecution there was none.¹⁸ A necessary temporary separation will not be considered a technical separation,¹⁹ unless there has been some possibility of tampering with the jury. Even a single word by one not a juror with a juror out of hearing of an officer during an innocent separation may constitute a technical separation,²⁰ though where it is shown a conversation is innocent it may not be a ground for reversal.²¹ The rules are more strict with regard to separation of a jury after they have retired to consider their verdict, and in civil as well as criminal cases the jury must be kept together in charge of a sworn officer until they have agreed on their verdict.²² But if a juror does separate without leave, after the cause has been submitted to the jury in a civil case, while it will be considered misbehavior on the part of the juror for which he may be punished,²³ it is an almost universal rule that such separation is not of itself sufficient ground for a new trial where there is no other misconduct operating to the party's prejudice.²⁴ The common law rule in felony cases was that the jury, after cause was submitted to them, were to be "kept together without meat, drink, fire, or candle" till they were agreed.²⁵ While the rule is not so strict at the present time, the general rule is that the jury cannot be permitted to separate after the cause has been submitted to them until they are agreed.²⁶ But in most states so holding, such separation is not ground for a new trial in felony cases less than capital where it is affirmatively shown that there was no improper communication, directly or indirectly;²⁷ although in some states misconduct will not be

¹⁶ *Jumpertz v. People*, 21 Ill. 375; *Embry v. State*, 95 Tex. Cr. R. 488.

¹⁷ *People v. Douglass*, 4 Cow. (N. Y.) 26; *Reins v. People*, 30 Ill. 256.

¹⁸ *State v. Hornsby*, 8 Rob. (La.) 554; *State v. Prescott*, 7 N. H. 287; *State v. Dolling*, 37 Wis. 396.

¹⁹ *People v. Lee*, 17 Cal. 76; *Neal v. State*, 64 Ga. 272; *State v. O'Brien*, 7 R. I. 336.

²⁰ *State v. Harris*, 12 Nev. 414.

²¹ *Thomas v. Commonwealth*, 180 Ky. 228.

²² *Sargent v. Ohio*, 11 Ohio 472.

²³ *Downer v. Baxter*, 30 Vt. 474.

²⁴ *Brandin v. Grannis & Wife*, 1 Conn. 402, note; *Armleder v. Lieberman*, 33 Ohio St. 77; *Alexander v. Dunn*, 5 Ind. 123.

²⁵ Co. Litt. 227 b.

²⁶ *Organ v. State*, 26 Miss. 78; *State v. Populus*, 12 La. Ann. 710; *Parker v. State*, 18 Ohio St. 88; *State v. Parrant*, 16 Minn. 157; *Williams v. State*, 45 Ala. 57.

²⁷ *Daniel v. State*, 56 Ga. 653; *People v. Adams*, 143 Cal. 208; *State v. West*, 11 Ida. 157; See Ann. Cas. 1914A p. 738.

presumed where it is not alleged or shown that there was such misconduct or opportunity for misconduct.²⁸ But even after cause is submitted in a case of a felony less than capital it would seem proper for a juror to separate if he is in custody of a sworn officer and nothing is said to or by him or in his presence about the case.²⁹ In capital cases the rule is the same after the cause has been submitted to the jury as before, that the jury should not be allowed to separate under any circumstances where harm could possibly come to the defendant from the separation.³⁰ Thus in Minnesota where the statute forbade that the jurors separate after the jury is charged in a trial for a capital offense, it was held ground for a new trial where the court permitted the jurors to go at large for five minutes after being charged.³¹ A necessary separation, however, would, even in a capital case, seem to be proper after the cause has been submitted to the jury when the jurors are in charge of a sworn officer at all times and no communication is had.³² In the principal case subject to discussion the men and women were both in custody of sworn officers and the decision is directly supported by decisions in other states. The facts were almost identical in an Iowa case where, after deliberating until 12:30 o'clock the next morning, the women jurors retired across the hall from the men, a bailiff standing guard outside of both rooms.³³ Although the case under discussion is not a capital case, the rule in such a case would be the same.³⁴ But where one juror retires to a room separate from the others and not accompanied by an officer it has been held ground for reversal,³⁵ although a contrary holding resulted under similar circumstances in a murder case in Texas.³⁶ Minnesota has a statute providing that the jury shall be kept together until an agreement is reached, but there is a proviso relating to separate accommodations for women jurors, although there is no mention that the proviso would apply after the jury had retired to deliberate. In view of the general trend of opinions, however, the result would undoubtedly have been the same without a statute on the subject. As to the defendant's contention that the separation amounted to an acquittal, it will suffice to say

²⁸ *State v. Turner and Reid*, 25 La. Ann. 573; *State v. Wart*, 51 Ia. 587; *Jack v. State*, 26 Tex. 1; *Territory v. Hexter*, 3 Mont. 206.

²⁹ *State v. Jones*, 7 Nev. 1036; *State v. Bowman*, 45 Ia. 418.

³⁰ *Waller v. People*, 209 Ill. 284.

³¹ *State v. Parrant*, 16 Minn. 157.

³² *Waller v. People*, 209 Ill. 284; *People v. Bonney*, 19 Cal. 426.

³³ *State v. Albery*, 197 Ia. 538.

³⁴ *Adkins v. Commonwealth*, 197 Ky. 385; *Elkins v. State*, 233 Pac. 491 (Okla. 1925).

³⁵ *State v. Pascal*, 147 La. 634.

³⁶ *Wood v. State*, 84 Tex. Cr. R. 187.

that no cases are to be found holding that a separation ever amounted to more than ground for new trial.

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CRIMINAL LAW—TRIAL—RIGHT OF DEFENDANT PLEADING NOT GUILTY TO FELONY CHARGE TO WAIVE JURY TRIAL.—Mandamus proceeding to command the judge of the Circuit Court of Cook County, an ex-officio judge of the Criminal Court, to expunge from the Criminal Court records the proceeding whereby one Weinberg, having been charged with rape, arraigned, and having pleaded not guilty, waived a jury trial, and the judge who heard the testimony entered judgment of not guilty. It was alleged in the petition for a writ of mandamus that the judge had neither authority to permit the waiver of a jury trial nor jurisdiction to hear and determine the cause upon such a waiver, and that the proceedings were void. *Held*, the defendant in a criminal prosecution on charge of felony may, on a plea of not guilty, waive a jury trial. *People ex rel. Swanson v. Fisher*, 172 N. E. 722 (Ill. 1930).

Most state constitutions make no provision regarding waiver of jury in criminal cases. Whether the courts are empowered to try felony charges without a jury is, therefore, largely a question of construction. The constitutionality of waiver will depend on the nature, purpose and historical foundation of the constitutional safeguard of jury trial.³⁷ Hence, in construing a constitution, the courts are influenced by one of three theories concerning the defendant's right to waive jury trial.³⁸ Under the first, jury trial is merely a personal privilege designed for the benefit of the accused and as such it may be waived.³⁹ So, adherents to this theory permit waiver in felony cases.⁴⁰ By the second, it is said that no provision is made for any other kind of tribunal for the trial of cases than a jury as constituted at common law and so its proper constitution is jurisdictional and cannot be waived.⁴¹ However, the recent federal case of *Patton v. United States*⁴² permitted waiver in felony cases under this theory, after having found no evidence that trial by jury in criminal cases was regarded as a structure of government in English and Colonial jurisprudence antedating the constitution. The third theory, which invariably is mentioned in federal de-

³⁷ Waiver of Trial by Jury in Criminal Cases, 25 Mich. Law Rev. 700.

³⁸ *State v. Woodling*, 53 Minn. 142.

³⁹ *State v. Sackett*, 39 Minn. 69; *Schick v. U. S.*, 195 U. S. 65.

⁴⁰ *Patton v. U. S.*, 281 U. S. 276.

⁴¹ *Low v. U. S.*, 169 Fed. 86; *In re Dawson*, 20 Idaho 178; *State v. Williams et al.*, 195 Iowa 374; *Commonwealth v. Rowe*, 257 Mass. 172; *Michaelson v. Beemer*, 72 Neb. 761; *State v. Smith*, 184 Wis. 664; *State v. Hirsch*, 91 Vt. 330; *Wartner v. State*, 102 Ind. 51.

⁴² 281 U. S. 276.

cisions denying the right to waive a jury trial, is that the public has an interest in the protection of the accused from trial by other than customary methods, even though it be against the will of the accused.⁴³ Since its basis in the 18th century fear of arbitrary magistracy has disappeared, it would seem that its use should be avoided in modern practice and theory.⁴⁴ These theories receive no application in states whose constitutional provisions relating to jury trial contain language which is peremptory and mandatory as is the case in Louisiana,⁴⁵ New York,⁴⁶ North Carolina,⁴⁷ and Oklahoma;⁴⁸ nor do they receive application in states whose legislatures have enacted statutory provisions on jury trial which are mandatory in form as in Arkansas,⁴⁹ Rhode Island,⁵⁰ and Vermont.⁵¹ The constitutions of California,⁵² Idaho,⁵³ Montana,⁵⁴ and Vermont,⁵⁵ give specific grants of authority for waiver of jury trial in criminal proceedings less than felony, while the constitution of the state of Virginia,⁵⁶ contains the same provisions in substance, thus presenting a positive reference that jury trial cannot be waived in felony cases. Iowa,⁵⁷ Massachusetts,⁵⁸ Missouri,⁵⁹ Nebraska,⁶⁰ New York,⁶¹ Ohio,⁶² Pennsylvania,⁶³ Texas,⁶⁴ Virginia,⁶⁵ and Wisconsin,⁶⁶ are states having no statutory provisions on the subject of jury trial, and their courts in adopting the public interest theory, have held that one charged with a felony can-

⁴³ *State v. Thompson*, 104 La. 167; *State v. Lockwood*, 43 Wis. 403; *State v. Simons*, 61 Kan. 752; *Michaelson v. Beemer*, 72 Neb. 761; *Cancemi v. People*, 18 N. Y. 128.

⁴⁴ *Extent of Valid Waiver of Criminal Procedure*, 25 *Harvard Law Rev.* 179.

⁴⁵ *State v. Jackson*, 106 La. 189; *State v. Thompson*, 104 La. 167.

⁴⁶ *Cancemi v. People*, 18 N. Y. 128.

⁴⁷ *State v. Stewart*, 89 N. C. 563; *State v. Holt*, 90 N. C. 749; *State v. Rogers*, 162 N. C. 656.

⁴⁸ *In re McQuown*, 19 Okla. 347.

⁴⁹ *Bond v. State*, 17 Ark. 290.

⁵⁰ *State v. Battey*, 32 R. I. 475.

⁵¹ *State v. Hirsch*, 91 Vt. 330.

⁵² *Constitution of the State of California*, (as amended and in force January 1, 1929), Art. I, sec. 7.

⁵³ *Constitution of the State of Idaho of 1890*, Art. I, sec. 7.

⁵⁴ *Constitution of the State of Montana*, Art. III, sec. 23.

⁵⁵ *Constitution of the State of Vermont*, Ch. 1, Art. X.

⁵⁶ *Constitution of the State of Virginia*, Art. I, sec. 8.

⁵⁷ *State v. Rea*, 126 Iowa 65.

⁵⁸ *Commonwealth v. Rowe*, 257 Mass. 172.

⁵⁹ *State v. Mansfield*, 41 Mo. 470.

⁶⁰ *Michaelson v. Beemer*, 72 Neb. 761.

⁶¹ *People v. Cosmos*, 205 N. Y. 91.

⁶² *Craig v. State*, 49 Ohio St. 415.

⁶³ *Commonwealth ex rel. Ross v. Egan*, 281 Pa. 251.

⁶⁴ *Jones v. State*, 52 Tex. Crim. App. 303.

⁶⁵ *Mays v. The Commonwealth*, 82 Va. 550.

⁶⁶ *State v. Smith*, 184 Wis. 664.

not waive his right to jury trial, or at least cannot confer jurisdiction to proceed without a jury. Illinois has consistently denied waiver in felony cases⁶⁷ prior to the case now under consideration, on the theory that jury trial cannot be waived so as to confer jurisdiction on the court to try the case. The instant Illinois case is evidence of a distinct tendency, especially in more recent years in decisions of courts under constitutional and statutory provisions not mandatory in form, to uphold waiver on the view that jury trial is a privilege,⁶⁸ though a majority of the courts in the country still deny to the defendant accused of a felony upon a plea of not guilty, the right to waive a trial by jury.

CRIMINAL LAW—VENUE—PROOF OF VENUE BY CIRCUMSTANTIAL EVIDENCE.—The defendant was convicted of murder in the first degree on a charge of killing one Lena Walsh in Poinsett County, Arkansas. The evidence shows the body of a woman was found a short distance from Black Oak Road in Poinsett County, about one hundred yards inside of the Poinsett County line. A witness who lived near the St. Francis River at Marked Tree in Poinsett County, testified that she heard cries and moans of a woman on the night of the murder, and that the noise was located between her house and the river bank, and came, she judged, a distance of about two city blocks. Other witnesses testified that on the night of the murder they heard pistol shots in the direction of the river from Marked Tree. Defendant claimed the venue was not proved. *Held*, that venue may be established like any other fact, without direct evidence that the offense was committed in the County charged in the indictment. *Walker v. State*, 30 S. W. (2nd) 819 (Ark. 1930).

Venue means the county wherein a cause is to be tried. Originally, the jury were but witnesses to prove or disprove the allegations of the parties; hence, every case had to be tried by a jury of the vicinage, because they were presumed to have personal knowledge of the parties as well as of the facts. The ancient rule survives unless statutory provisions to the contrary have been made, and a criminal is answerable, therefore, only in the jurisdiction where the crime is committed. The question of venue still is considered so important that if it is not properly proved, prosecution will fail, because the courts cannot properly take jurisdiction of the case before it. Under the

⁶⁷ *Harris v. People*, 128 Ill. 585; *Morgan v. People*, 136 Ill. 161.

⁶⁸ *State v. Shearer*, 27 Ariz. 311; *State v. Worden*, 46 Conn. 349; *Murphy v. State*, 97 Ind. 579; *Commonwealth v. Rowe*, 257 Mass. 172; *State v. Woodling*, 53 Minn. 142; *Edwards v. State*, 45 N. J. L. 419.

common law it was necessary that someone testify in so many words as to the place where the offense was committed. The courts in most states, however, have allowed the question of venue to be proved by circumstantial evidence from all the circumstances introduced.⁶⁹ The law in Illinois is well settled that venue may be proved by circumstantial evidence and it is not necessary that someone testify in terms as to the place where the offense was committed for the purpose of establishing venue.⁷⁰ The Supreme Court of Illinois in the *People v. Allegretti*,⁷¹ said, "Venue may be proved by circumstantial evidence. 'It is not necessary that someone testify, in so many words, to the place where the offense was committed, but it is sufficient if the evidence, as a whole leaves no reasonable doubt as to the act upon which an indictment is based having been committed at the place laid in the indictment.'⁷² 'The venue of an offense may be proven like any other fact in a criminal case. It need not be established by positive testimony nor in the words of the information, but if from the facts appearing in evidence, the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient.'⁷³ The evidence shows that the offense occurred in Chicago, Cook County, and that the city is a large one; that the Yellow Cab Company is an Illinois corporation. We think it is clear from the entire record that the offense occurred in Cook County, Illinois, rather than Cook County in some other state." The Iowa Supreme Court in a rape case said that evidence that the child lived with her parents, that her father was a farmer whose residence was the city of Sheldon, Carroll township, and had been for 22 years, and that the transaction complained of occurred at his home, was sufficient to warrant the finding of the jury that the act was committed in the county given in the indictment.⁷⁴ Proof of venue is a fact which belongs exclusively

⁶⁹ *Grayson v. United States*, 272 Fed. 553; *Pounds v. State*, 15 Ala. App. 223; *Quayle v. State*, 19 Ariz. 91; *People v. Peete*, 54 Cal. App. 333; *Morakes v. State*, 158 Ga. 114; *Jackson v. State*, 187 Ind. 694; *Nelson v. Commonwealth*, 232 Ky. 568; *State v. Frost*, 160 Minn. 317; *State v. Palmer*, 281 Mo. 525; *State v. Woods*, 54 Mont. 193; *Ward v. State*, 13 Okl. Cr. 81; *City of Spokane v. Knight*, 96 Wash. 403; *Kellar v. State*, 174 Wis. 67; *McFetridge v. State*, 32 Wyo. 185; *Allen v. State*, 82 Tex. Cr. R. 416; *West v. Commonwealth*, 125 Va. 747; *State v. McDonie*, 89 W. Va. 185; *People v. Golub*, 333 Ill. 554; *Ussery v. State*, 154 Miss. 704.

⁷⁰ *Weinberg v. People*, 208 Ill. 15; *Sullivan v. People*, 122 Ill. 385; *People v. McIntosh*, 242 Ill. 602; *People v. Shaw*, 300 Ill. 451; *People v. Golub*, 333 Ill. 554.

⁷¹ *People v. Allegretti*, 291 Ill. 364.

⁷² Quotation from *Porter v. People*, 158 Ill. 370.

⁷³ Quotation from *Weinecke v. State*, 34 Neb. 14.

⁷⁴ *State v. Meyer*, 135 Ia. 507.

to the province of the jury and with it the court has no possible concern.⁷⁵

CONSTITUTIONAL LAW—PUNISHMENT—SENTENCE OF BANISHMENT AS VIOLATING CONSTITUTION.—The defendant was convicted of a violation of the liquor law and sentenced to pay a fine of \$500 and costs of \$500. In addition the sentence provided he should leave the state within thirty days, not to return for a probationary period of five years. The defendant brought error on the ground the sentence violated section 1 of the Fourteenth Amendment of the Constitution of the United States, and paragraphs 9, 15 and 16 of Article 2 of the Constitution of the State of Michigan.⁷⁶ *Held*, a sentence of banishment of accused from the state is erroneous and opposed to public policy. Reversed and remanded for a legal sentence. *People v. Baum*, 231 N. W. 95 (Mich. 1930).

Banishment is not a cruel and unusual punishment.⁷⁷ The United States as a sovereign and independent nation has the right to exclude or expel aliens or any class of alien absolutely or upon certain conditions.⁷⁸ On the ground that the individual states are not independent, supreme sovereignties in regard to those matters delegated by the people to the federal government, the court in the instant case held that the states have no right to punish by banishment. To quote the court, "To permit one state to dump its convicted criminals into another would entitle the state believing itself injured thereby to exercise its police and military power in the interests of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the union itself. Such a punishment is not authorized by statute and is impliedly prohibited by public policy." In this the court is sustained by the Supreme Court of South Carolina, which said, "We do not recognize the circuit judge as possessing any right to impose such a sentence as is involved in the perpetual banishment of the defendant from the state set out in the sentence."⁷⁹ Banishment did not originate in England as a sentence for punishment, but was voluntary—the accused party fled to a sanctuary, confessed

⁷⁵ *State v. Nettles*, 41 La. Ann. 323.

⁷⁶ Paragraph 15 of Article 2 of the Michigan Constitution is equivalent to the Eighth Amendment to the Constitution of the United States.

⁷⁷ *Legarda v. Valdez*, 1 Philippine 146; *The People v. Potter*, 1 Park Cr. R. 47.

⁷⁸ *Fong Yue Ting v. U. S.*, 149 U. S. 698.

⁷⁹ *State v. Baker*, 58 S. C. 111.

his crime and took an oath to leave the kingdom, not to return without permission.⁸⁰ This was known as abjuration, and while this was later abolished in England, it became customary to grant pardons on condition the accused would leave the country for a term, the original sentence being inflicted in case of a violation.⁸¹ Conditional pardons are recognized in this country⁸² and in several instances in the United States, banishment has been made a condition to pardon by state governors.⁸³ The same considerations were before the court of South Carolina in 1829 in a case of permanent banishment from the state, and the court remarked, "It is said, moreover, that the substitution of banishment is illegal, as it has the effect of casting our convicts on our sister states, or foreign nations, and is, therefore, void We have no law which prohibits it; nor is there anything in the Constitution of the United States, or the law of nations, which forbids us to cast off offensive members of society. A foreign state, it is true, is not bound to receive and entertain them; and if they forbid it, his entry into their territory is a violation of their laws, but one for which he alone is responsible."⁸⁴ It does not appear from the case of *State v. Baker*,⁸⁵ heretofore quoted, that any change in the policy of the state had taken place since the earlier cases, and if the reasons given by the Michigan court in the instant case establish a proposition that such a sentence is impliedly against public policy, certainly the same should apply to make the pardon of a governor, conditioned on banishment from the state, against public policy. While it is true that a pardon conditioned on banishment is not equivalent to a sentence of banishment, the rights of other states are violated either way. In spite of the conditional pardon the banished criminal may be an undesirable. On the ground of public policy alone, therefore, the cases are not to be reconciled, but perhaps we may charge the change in the attitude of the courts to the submergence of the theory of state sovereignty under the theory that the states are, after all, integral parts of one sovereign.

CORPORATIONS—DIRECTORS—STOCKHOLDERS' RIGHT TO FILL VACANCIES IN BOARD OF DIRECTORS.—A board of directors, consisting originally of three members, was reduced to two upon the resignation of one director after the disposing of his share

⁸⁰ 4 Bl. Com. 333.

⁸¹ 1 Chitty Cr. L. 773.

⁸² The United States v. Wilson, 1 Pet. 156.

⁸³ The People v. Potter, 1 Park Cr. R. 47; State v. Smith, 1 Bailey 283; The People v. Pease, 3 Johns. Cas. 333; State v. Mary Fuller, 1 McCord 178.

⁸⁴ State v. Smith, 1 Bailey 283.

⁸⁵ 58 S. C. 111.

holdings. The remaining members of the board, because they were antagonistic toward one another, were unable to come to an agreement. A special stockholders meeting was called to elect another director, and the defendant was duly elected by a majority of all the votes cast. The relator, one of the original directors, contested the validity of the election and instituted a quo warranto proceeding to oust the newly elected director, and judgment of ouster was granted. *Held*, statute authorizing directors to fill vacancies in board is contrary to constitutional provision granting exclusive right to stockholders, and therefore invalid. Reversed and remanded. *People ex rel. Weber v. Cohn*, 339 Ill. 121 (1930).

This case involves solely a question of the construction of Article XI, section 3 of the Illinois Constitution and the validity of paragraph 5 of section 21 of the Corporation Act,⁸⁶ the former providing that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy the number of shares owned by him or to cumulate the same, "and such directors or managers shall not be elected in any other manner;" the latter providing that the directors of a corporation shall "fill all vacancies which may happen in the board of directors caused by death, resignation, or otherwise, until the next annual meeting of the stockholders." Where the question is one of construction, constitutions as well as statutes should be read and understood according to the most natural and obvious import of the language used,⁸⁷ great consideration being given to that construction which has been long acquiesced in where there is any apparent ambiguity in the phraseology.⁸⁸ Where a construction has been placed upon a statute by those charged with its execution and application, such construction shall be entitled to great weight and should not be overruled unless clearly erroneous,⁸⁹ the greatest weight being given to constructions of the legislature itself.⁹⁰ The Illinois Supreme Court has already held "the constitution does not derive its force from the convention which framed, but from the people who ratified it, and the intent to be arrived at is that of the people."⁹¹ Consequently, the words employed should be given the meaning which they bear in ordinary use among the people, except where the meaning of a word used is established by statute or by judicial

⁸⁶ Cahill's Ill. Rev. St. (1929), Ch. 32, par. 21.

⁸⁷ *People v. Stevenson*, 281 Ill. 17.

⁸⁸ *People v. The Board of Supervisors of La Salle County*, 100 Ill. 495; *Nye v. Forman*, 215 Ill. 285.

⁸⁹ *Mathews v. Shores*, 24 Ill. 27; *Whittemore v. People*, 227 Ill. 453.

⁹⁰ *Mitchell v. Lowden*, 288 Ill. 327; *Boehm v. Hertz*, 182 Ill. 154.

⁹¹ *City of Beardstown et al. v. City of Virginia et al.*, 76 Ill. 34.

construction.⁹² After reviewing the rules regarding construction, the court in this case held that the wording of the constitution in providing that "such directors or managers shall not be elected in any other manner" was conclusive, and the statute which provided for the election of directors in a manner different from that prescribed by the constitution was consequently invalid. In so holding, the court affirmed and gave effect to an opinion written several years ago by the then attorney-general.⁹³ The court in determining a question of construction is obliged to construe an act in favor of its constitutionality and validity, unless satisfied beyond a reasonable doubt that it is invalid,⁹⁴ but where the meaning of the statute is plain and the court is satisfied beyond a reasonable doubt that it contravenes the constitution, it is the court's duty to hold the statute unconstitutional.⁹⁵ The precise question presented by this case has never before been judicially determined in this state, but in reaching a decision the court has followed the precedent established in a series of cases involving the rights of stockholders, which hold variously that a contract whereby certain bondholders attempted to exercise the right to vote at stockholders' meetings was invalid;⁹⁶ that while a stockholder may permit his stock to be voted by a trustee under a voting trust, he cannot deprive himself or be deprived of the right to vote the stock;⁹⁷ that a corporation cannot deprive preferred stockholders of their constitutional right to vote for directors;⁹⁸ and that a by-law depriving any stockholder of his right to vote is invalid.⁹⁹ The decision of the court in the instant case has been criticized¹⁰⁰ on the ground that it was unnecessary to declare the statute unconstitutional and that by so doing a burden has been placed upon all Illinois corporations which will, of necessity, hamper them in their operations and create unnecessary expenditure and inconvenience by requiring a special meeting of stockholders every time a vacancy occurs in the board of directors. At first sight this criticism would appear to be just. However, when the arguments offered are considered and weighed in the light of the established principles of the law, the criticism does not appear to have any basis in such established principles. On

⁹² *Burke v. Snively*, 208 Ill. 328.

⁹³ Opinions of Edward J. Brundage, Attorney-General, #11427, Dec. 29, 1922.

⁹⁴ *People v. Solomon*, 265 Ill. 28.

⁹⁵ *People ex rel. Gamber v. Sholem*, 294 Ill. 204.

⁹⁶ *Durkee v. People*, 155 Ill. 354.

⁹⁷ *Luthy v. Ream*, 270 Ill. 170.

⁹⁸ *People v. Emmerson*, 302 Ill. 300.

⁹⁹ *Hall v. Woods*, 325 Ill. 114.

¹⁰⁰ *Michigan Law Review*, Vol. XXIX, No. 1 (Nov. 1930), p. 109.

the contrary, it appears to be founded upon questions of convenience to the directors, reposing of confidence by the stockholders in such directors, and others of similar idealistic rather than legal nature. Where the interests of a corporation are concerned, those interests are the interests of the stockholders, who, in turn, are the corporation. The fact that the stockholders have sufficient confidence in this man or that man to elect him to the board of directors does not imply that they would repose a similar confidence in a third party of the choosing of either or both of these men. Indeed, it is conceivable that such a person, while bearing the endorsement of all the remaining members of the board, might, before the regular annual stockholders' meeting, bring about irreparable injury to the corporation and to the interests of the stockholders, if the stockholders are deprived of the right reserved to them by the constitution—a reservation they must impliedly have had in mind when electing the original members of the board. The criticism further argues that the constitution could have been construed to reserve to the stockholders the power to elect directors at the regular annual meeting only, but this the court had no power to do, because the constitution specifically states that “in all elections for directors or managers,” each stockholder shall have the right to vote, and where the meaning of both the constitution and a statute are plain and the latter contravenes the former, it is the duty of the court to hold the statute unconstitutional.¹⁰¹

INJUNCTION—DEFENSE—INCONVENIENCE TO DEFENDANT.—The defendant, Columbus Theater, Inc., owner of property adjoining complainant's, erected a theater building. Complainant that the building encroached on their land two and one-half feet, the complainants filed a bill for a mandatory injunction to compel the defendants to remove their building. The defendant, Lodi American Theater Company, was the lessee of the theater. After this suit was started, the holder of the mortgage on the theater property foreclosed, and the Lodi American Theater Company purchased at the foreclosure sale and now owns the property. *Held*, complainants are entitled to a mandatory injunction against the original owners, who erected the building on a portion of complainant's land, to compel them to remove the encroachment. Inconvenience to defendants will not be considered. *Cutrona et al. v. Columbus Theater, Inc. et al.*, 151 Atl. 467 (N. J. Ch. 1930).

“In a suit of this sort,” said the Vice Chancellor in this case, “the court does not consider the inconvenience or damage

¹⁰¹ *People ex rel. Gamber v. Sholem*, 294 Ill. 204.

which may result to the defendants from putting the complainants in possession of their property." This consideration should be prefaced by the statement that the question of balancing equities cannot arise except in cases where some sufficient reason for equity jurisdiction exists, such as irreparable injury or the prevention of multiplicity of suits;¹⁰² in other cases, the injunction will be refused because of adequate legal remedy.¹⁰³ Injunctions against a trespass are sometimes refused because the hardship, injury, or inconvenience which they would cause the defendant are out of all proportion to the benefit they would bring to the plaintiff.¹⁰⁴ However, it should also be noted that merely because inconvenience will arise, the court will not be induced to withhold preventative relief.¹⁰⁵ Factors requiring the considerations of the court are cases where the defendant's building encroaches but slightly upon the plaintiff's land and the plaintiff's damage is small, while the cost of removal to the defendant is great, or where the defendant is engaged in a business which serves public convenience, and the defendant can plead as a reason for not granting the injunction, not only injury to himself but also to the public.¹⁰⁶ In so far as the utility to the public has been made an argument, it resolves itself upon the propriety of taking private property for public use without the requisite condemnation proceedings.¹⁰⁷ The courts of Massachusetts and New York, upon various states of facts, have considered the question oftener than the courts of any other jurisdiction, and acting independently, have arrived at much the same result.¹⁰⁸ The Massachusetts court has summarized its position as follows: "Where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by the removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but

¹⁰² *Wetherell v. Newington*, 54 Conn. 67; *Rosenberger v. Miller*, 61 Mo. App. 422.

¹⁰³ *Nichols v. Sutton & Porter*, 22 Ga. 369; *Mapes et al. v. Charles et al.*, 8 N. Y. Supp. 665; *O'Neil v. McKeesport*, 201 Pa. 386; *Hyatt v. Bates*, 40 N. Y. 164.

¹⁰⁴ *Robinson v. Clapp*, 67 Conn. 538; *Scott v. Palms*, 48 Mich. 505; *Grey v. Mayor, etc., of City of Paterson*, 60 N. J. Eq. 385; *Chapin v. Brown*, 15 R. I. 579; *Pettibone v. La Crosse & Milwaukee Ry. Co.*, 14 Wis. 479; *Norfolk Southern R. R. Co. v. Stricklin*, 264 Fed. 546; *Texas Co. v. United States Asphalt Refining Co. et al.*, 140 Md. 350; *Standard Chemical & Oil Co. v. Faircloth*, 200 Ala. 657.

¹⁰⁵ *Northern Pacific Ry. Co. v. Cunningham*, 103 Fed. 708.

¹⁰⁶ *Fraser v. City of Portland*, 81 Ore. 92.

¹⁰⁷ *Hinchman et al. v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75.

¹⁰⁸ *Pomeroy's Equity Jurisprudence* (2nd ed.), Vol. II, p. 4361.

will leave the plaintiff to his remedy at law."¹⁰⁹ And New York summarizes as follows: "It must be remembered that a willful trespasser cannot in this way acquire an inch of land, because the mandatory injunction must issue as to him; that in other cases where the injury to the plaintiff is irreparable the mandatory injunction will issue, and permanent damages will not be awarded; that where the granting of an injunction would work greater damage to an innocent defendant than the injury from which the plaintiff prays relief, the injunction could be refused absolutely, and the plaintiff compelled to seek his remedy at law."¹¹⁰ Many cases can be found on one extreme or the other, such as the instant case, but doubtless the rules of New York and Massachusetts—and it should be noted that Illinois follows this trend in its decisions¹¹¹—are the best to follow.

INSURANCE—DOUBLE INDEMNITY CLAUSE—ELECTROCUTION AS CONSTITUTING AN ACCIDENT.—Suit was brought to recover \$5,000.00 for accidental death of an assured under the double indemnity clause of a policy of insurance. The contract provided that the insurer would pay "double the face of this policy upon receipt of due proof that the death of insured resulted directly and independently of all other causes from bodily harm effected solely through external, violent and accidental cause." The policy further provided: "This double indemnity benefit will not apply if the insured's death resulted . . . from any violation of law by the insured. This policy . . . shall be incontestable after two years from its date of issue except for non-payment of premiums." Facts produced upon trial showed that assured met his death by electrocution pursuant to a conviction for murder and a subsequent sentence that he suffer death in that matter. The plaintiff's declaration merely set out that certain persons, against the will and intention of insured, forcibly placed him in a chair, caused him to be strapped to it, then caused a current of electricity of sufficient intensity and strength to cause death, to be applied and continued through the body of insured until he was dead. Over the objection of the plaintiff's counsel, the court allowed the defendant to introduce the record, showing the electrocution

¹⁰⁹ *Lynch v. Union Institution for Savings*, 159 Mass. 306. For other Massachusetts cases see *Tucker v. Howard*, 128 Mass. 361; *Brande v. Grace*, 154 Mass. 210; *Starkie v. Richmond*, 155 Mass. 188; *Lynch v. Union Institution for Savings*, 158 Mass. 394.

¹¹⁰ *Goldbacher v. Eggers*, 76 N. Y. Supp. 881. For other New York cases see *Crocker v. Manhattan Life Ins. Co.*, 70 N. Y. Supp. 492; *Proskey v. Cumberland Realty Co.*, 70 N. Y. Supp. 1125.

¹¹¹ *Lloyd v. Catlin Coal Co.*, 210 Ill. 460; *Dunn v. Youmans*, 224 Ill. 34; *Hill v. Kimball*, 269 Ill. 398.

pursuant to sentence imposed by a court of competent jurisdiction. *Held*, death at the hands of the law was not an accident within the meaning of the double indemnity clause. *Diamond et al. v. New York Life Ins. Co.*, 42 Fed. (2nd) 910 (Dist. Ct. N. D. Ill. 1930).

Since it was obvious that the insured met his death from bodily injury effected solely through an external and violent cause, the question for determination was, "Did the death result from an accidental cause?" The court held that the insured did not meet his death through accidental cause, since the evidence showed that he died at the hands of the law under judgment of a court of competent jurisdiction; that his death was the direct consequence of his intentional, malicious, and felonious undertaking; that when insured killed his wife he knew that under the law of Indiana death was a possible result of his act; that, under the circumstances, he could have reasonably anticipated that his death would ensue by reason of the murder committed; that he intentionally engaged in an undertaking which might be expected to produce his death; that a man is presumed to intend the natural and probable consequences of his voluntary acts. The conclusion is within the accepted doctrine of accidental death enounced by the courts in analogous cases. There can be no recovery where claimants voluntarily and deliberately enter into an undertaking, the result of which is reasonably within the contemplation of the parties.¹¹² It is further pointed out that the death of the plaintiff in this case resulted proximately from a violation of law, this being a risk expressly accepted by the terms of the double indemnity clause in the contract of insurance. Counsel for the plaintiff sought to invoke the incontestable clause, but the court held that the insurer promised to pay the double indemnity in certain specific contingencies, among which was the death of the insured should result from "bodily injury effected through accidental cause;" that the liability of the insurer arises, under the double indemnity clause only when and if the facts bring the plaintiff within the terms of the contract; that the insurer may deny its liability on the ground that the death of the insured did not occur in a manner whereby any liability arises. The conclusion reached, in view of the weight of authority, is obvious, since, "a provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen. It

¹¹² *Hutton v. States Accident Insurance Co.*, 267 Ill. 267; *Fidelity and Casualty Co. of N. Y. v. Stacey's Executor*, 143 Fed. 271; *Taliaferro v. Travelers' Protective Ass'n.*, 80 Fed. 368.

cannot properly be said that a party to an instrument contests it by raising the question whether under its terms a liability asserted by another party has or has not accrued."¹¹³

LIBEL AND SLANDER—PUBLICATION—DICTATION OF DEFAMATORY LETTER TO STENOGRAPHER AS PUBLICATION.—Motion to dismiss for insufficiency a complaint wherein it was alleged that admittedly defamatory matter was dictated by defendant to his stenographer, who was caused to read and transcribe it. *Held*, that the complaint stated a cause of action, based on libel, since a publication thereof was adequately stated. *Ostrowe v. Lee*, 244 N. Y. Supp. 28 (New York 1930).

This case, within the confines of its facts, is sustained by the weight of authority.¹¹⁴ Yet there are interesting sidelights to the decision which give rise to several fine distinctions. In the cases cited in footnote 114 the parties defendant were individuals. But where there is a corporate defendant, a letter dictated by an agent thereof to a stenographer employed for that purpose by the corporation, is not published.¹¹⁵ This rule is closely confined, for it is not said that there cannot be publication to any agent of the corporation, but only that there is none by dictation of a letter to the stenographer,¹¹⁶ although several decisions extend the rule, erroneously in the opinion of the writer, to all agents of the corporation, on the ground that the occasions were privileged.¹¹⁷ The rule above stated, where no publication exists by dictation to the stenographer engaged in the course of her usual employment, is in direct conflict with some decisions of considerable merit,¹¹⁸ and even the Court of Appeals of New

¹¹³ *Sanders v. Jefferson Standard Life Insurance Co.*, 10 Fed. (2nd) 143. See also *Hearin v. Standard Life Ins. Co. et al.*, 8 Fed. (2nd) 202; *Flannagan v. Provident Life and Accident Ins. Co. et al.*, 22 Fed. (2nd) 136; *Mack v. Connecticut General Life Ins. Co. of Hartford*, 12 Fed. (2nd) 416; *Wright v. Philadelphia Life Ins. Co.*, 25 Fed. (2nd) 514; *Scarborough v. American National Insurance Co.*, 171 N. C. 353; *Childress v. Fraternal Union of America*, 113 Tenn. 252; *Howard v. Missouri State Life Ins. Co.*, 289 S. W. 114 (Tex. Civ. App. 1927); *Scales v. Jefferson Standard Life Ins. Co.*, 155 Tenn. 412; *Woodbery v. N. Y. Life Ins. Co.*, 221 N. Y. Supp. 357; *Myers v. Liberty Life Ins. Co.*, 124 Kan. 191.

¹¹⁴ *Gambrill v. Schooley*, 93 Md. 48; *Newell, Libel & Slander* (4th ed.) 242; *Nelson v. Whitten*, 272 Fed. 135; *Moran v. O'Regan*, 38 N. B. 399; *Perdon v. Dickens*, 161 Ala. 181.

¹¹⁵ *Owen v. Ogilvie Publishing Co.*, 53 N. Y. Supp. 1033; *Wells v. Belstrat Hotel Corp.*, 208 N. Y. Supp. 625; *Central of Georgia Ry. Co. v. Jones*, 18 Ga. App. 414.

¹¹⁶ *Kennedy et al. v. James Butler, Inc.*, 245 N. Y. 204.

¹¹⁷ *Prins v. Holland N. A. Mtge. Co.*, 107 Wash. 206; *Globe Furniture Co. v. Wright*, 49 App. D. C. 315.

¹¹⁸ *Berry v. City of New York Ins. Co.*, 210 Ala. 369; *Gambrill v. Schooley*, 93 Md. 48; *Pullman v. Hill & Co., Ltd.* [1891], 1 Q. B. 524.

York indicated a doubt as to whether it would uphold the ruling in *Owen v. Ogilvie Publishing Co.*,¹¹⁹ or follow the authorities to the contrary.¹²⁰ There remains the English rule, which disregards the corporation theory and holds in accordance with the main case¹²¹ and the weight of authority in this country,¹²² but which has been criticized several times in cases where privilege has been confused with publication,¹²³ but which still remains as authority,¹²⁴ unless it be overruled insofar as it holds the publication that of libel and not of slander.¹²⁵ Whether the matter in the main case is libel or whether it is slander is not discussed, nor does it appear in any of the cases in this country, though it is recognized and assigned as error in the leading case on the subject.¹²⁶ No doubt, if this question were squarely answered, some of the conflict would evaporate, for it inevitably enters into the background, at least, of the reasoning in the corporate defendant cases.¹²⁷

NON-RESIDENT CORPORATIONS — JURISDICTION OF FEDERAL COURTS—SERVICE OF PROCESS ON ATTORNEY AS AGENT FOR NON-RESIDENT CORPORATION.—Suit was brought on a contract between plaintiff, a Massachusetts corporation, and defendant, a Virginia corporation, in the Federal District Court for Massachusetts, and service of process was obtained upon a Boston attorney who had appeared as attorney of record for defendant in a previous suit arising out of this same contract. Provision is made for service in this manner by a Massachusetts statute¹²⁸ and it is claimed that such process should be held valid and enforced by the Federal Court under the Conformity Act.¹²⁹ *Held*, service of process upon attorney of non-resident corporation, as prescribed by the Massachusetts statute, insufficient to give Federal Court jurisdiction. Judgment for plaintiff reversed and dismissed for want of jurisdiction. *McNeal-Edwards Co. v. Frank L. Young Co.*, 42 Fed. (2nd) 362 (Circuit Ct. of App. 1930).

¹¹⁹ 32 App. Div. 465, which holds the dictation of a defamatory letter to stenographer is not publication.

¹²⁰ *Kennedy v. James Butler, Inc.*, 245 N. Y. 204.

¹²¹ *Gambrill v. Schooley*, 93 Md. 48.

¹²² *Pullman v. Hill & Co.* [1891], 1 Q. B. 524.

¹²³ *Boxius v. Goblet Freres* [1894], 1 Q. B. 842; *Edmondson v. Birch & Co.* [1907], 1 K. B. 371.

¹²⁴ *Moran v. O'Regan*, 38 N. B. 399.

¹²⁵ *Angeline v. Anlico*, 31 New. Zeal. L. R. 841.

¹²⁶ *Gambrill v. Schooley*, 93 Md. 48, described as the leading case in *Newell, Libel and Slander* (4th ed.), p. 242.

¹²⁷ *Owen v. Ogilvie Publishing Co.*, 53 N. Y. Supp. 1033; *Wells v. Belstrat Hotel Corp.*, 208 N. Y. Supp. 625.

¹²⁸ Gen. Laws Mass., Ch. 227, secs. 1, 2, 3 and 4.

¹²⁹ U. S. Rev. St., sec. 914.

The jurisdiction of circuit courts of the United States has been defined and limited by the Acts of Congress and can be neither restricted nor enlarged by the statutes of a state.¹³⁰ Wherever Congress has legislated upon any matter of practice and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter.¹³¹ The ultimate determination of the question of jurisdiction is for the Supreme Court,¹³² which has said that "a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."¹³³ Where service is attempted to be obtained upon a non-resident corporation through its duly authorized agent, such service can only be obtained where the corporation is carrying on business of such a character and extent within the state as would warrant the inference that it is present there by its officers authorized to receive service,¹³⁴ and in this connection it has been held that the doing of a single business transaction or even of as many as four transactions by a non-resident corporation in the state or district of suit would not be sufficient to warrant this presumption.¹³⁵ A statute which provides that a special appearance for the purpose of objecting to the jurisdiction of the court shall be a waiver of immunity is not binding upon the Federal Courts.¹³⁶ Similarly, statutory provisions that defendant must specify his appearance to be made solely for the purpose of questioning the jurisdiction,¹³⁷ or that if the purpose for which such special appearance is entered is not sanctioned or sustained by the court a general appearance shall be entered, and a failure to consent to the entrance of such general appearance shall be treated as a general appearance,¹³⁸ or that return of service by the sheriff shall be conclusive on the parties as regards

¹³⁰ Toland v. Sprague, 12 Pet. 300; Mexican Central Ry. Co. v. Pinkney, 149 U. S. 194; Southern Pacific Co. v. Denton, 146 U. S. 202.

¹³¹ Ex Parte Fisk, 113 U. S. 713.

¹³² Mechanical Appliance Co. v. Castleman, 215 U. S. 437.

¹³³ Goldey v. Morning News, 156 U. S. 518.

¹³⁴ St. Louis Southwestern Ry. Co. of Texas v. Alexander, 227 U. S. 218.

¹³⁵ Rosenberg Bros. & Co. Inc. v. Curtis Brown Co., 260 U. S. 516; Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573.

¹³⁶ Mexican Cent. Ry. Co. v. Pinkney, 149 U. S. 194; Southern Pacific Co. v. Denton, 146 U. S. 202.

¹³⁷ Wabash Western Ry. Co. v. Brow, 164 U. S. 271.

¹³⁸ Davidson Bros. Marble Co. v. United States ex rel. Gibson, 213 U. S. 10.

jurisdiction,¹³⁹ have all been declared to be not binding on the Federal Courts and in one instance to be contrary to the laws of the United States and invalid.¹⁴⁰ The doctrine in these cases is clear, and well expressed by the court in *Wabash Western Railway Co. v. Brow*,¹⁴¹ where it is held that "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right."

¹³⁹ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437.

¹⁴⁰ *Davidson Bros. Marble Co. v. United States ex rel. Gibson*, 213 U. S. 10.

¹⁴¹ 164 U. S. 271.